Supreme Court, U.S.
FILED

98 575 OCT 5 1998

OFFICE OF THE CLERK

No. _____

In The

Supreme Court of the United States

October Term, 1998

DALE WAYNE BESTELMEYER,

Petitioner,

vs.

IVALEE HENRY, WARDEN,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

ROGER S. HANSON, Esq.
Counsel of Record
1517 E. Fourth Street
Santa Ana, CA 92701
(714) 953-0638

Attorney for Petitioner
Member of the Bar
Supreme Court of the United States

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

1. Whether in a 28 U.S.C. 2254 Petition filed on March 4, 1996, prior to the date of the "Antiterrorism and Effective Death Penalty Act", where the then existing level of seeking appeal to a U.S. Circuit Court from denial of the petition by a District Court was a "Certificate of Probable Cause" under 28 U.S.C. 2253, may a circuit Court deny the right to appeal by rejecting at the level of what must be shown to issue a "Certificate of Appealability" pursuant to 28 U.S.C. 2253(c)(2)?

2. Where an opposition to a Denial of 28 U.S.C. 2254 Petition is based on clear error of an U.S. Magistrate Judge, and said error is specifically pointed out to the District Court, by citation to the Court record, may a District Court, summarily, adopt the Magistrate's recommended denial without addressing, in writing, the clearly pointed out error?

3. Whether Petitioner was denied his right of confrontation under the 6th and 14th Amendments to the U.S. Constitution by the Court adopting the post-trial, non-evidence, non-sworn, non-confronted, non-cross-examined report of a probation officer that erroneously asserted the crimes were done with "violence and a threat of harm," thus allegedly permitting consecutive sentencing, under California Penal Code 667.6(d), where otherwise such consecutive sentencing would be precluded and illegal since sworn trial evidence did not support it?

4. Whether the instant 28 U.S.C. 2254 Petition here raised recognized U.S. Constitutional errors in State sentencing beyond that permitted by State law, within the meaning of *Whorlen v. United States*, 445 U.S. 684, 689 n4,

QUESTIONS PRESENTED – Continued

100 S. Ct. 1432, 63 L.Ed.2d 715 (1880) and *Ballard v. Estelle*, 937 F. 2d 453, 456 (9th Cir. 1991) and thus provides a basis for an appeal to the Circuit from a Denial of that Petition by the District Court?

5. Whether, in view of this noted and clearly set-forth error, did the U.S. Court of Appeals wrongly refuse to issue a "Certificate of Appealability" (28 U.S.C. 2253(c)(2)) and also wrongly refused to issue a "Certificate of Probable Cause" (28 U.S.C. 2253) to allow this appeal to go forward to the Circuit?

6. Whether this Court must grant certiorari to set guidelines for allowable appeal to the U.S. Circuit Courts from Denial of 28 U.S.C. 2254 petitions by U.S. District Courts following the advent of the Antiterrorism and Effective Death Penalty Act (AEDPA), Pub. L. No. 104-132, 110 Stat. 1214?

7. Whether the AEDPA amendments changed the standards to allow appeal to the U.S. Circuit Courts by state prisoners having suffered a denial of a 28 U.S.C. 2254 Petition in the U.S. District Courts?

8. Whether a conflict in the United States Circuit Courts exist as to whether 28 U.S.C. 2253(c)(2) changed the standards previously existing under 28 U.S.C. 2253 as to certificates allowing appeal; compare *Williams v. Calderon*, 83 F.2d 281, 286 (9th Cir. 1996) with *Lennox v. Evans*, 87 F.2d 431, 434 (10th Cir. 1996)?

9. Whether error occurred in Petitioner's state "slow plea of guilty" procedure under *Boykin v. Alabama*,

QUESTIONS PRESENTED – Continued

395 U.S. 238 (1969) by the Court failing to advise Petitioner of the maximum sentence he faced and of his right against self-incrimination?

TABLE OF CONTENTS

Page

Questions Presented i

Table of Authorities vii

Introduction 1

Opinion Below 1

Jurisdictional Grounds 2

United States Constitutional Provisions and Statutes Involved 3

California State Statutes Involved 4

Statement of the Case 4

Reasons for Granting Petition For Certiorari 10

Argument

I. CERTIORARI SHOULD BE GRANTED BECAUSE: (A) THERE IS A NEED TO EXPLICATE WHETHER 28 U.S.C. 2253(c)(1)(2)(3) ALTERED THE PREVIOUS STANDARDS OF 28 U.S.C. 2253 REGARDING REQUIRING A "CERTIFICATE OF APPEALABILITY" RATHER THAN A "CERTIFICATE OF PROBABLE CAUSE" AND (B) THE NEW LEGISLATION OF 28 U.S.C. 2253(c)(1)(2)(3) WAS ERRONEOUSLY APPLIED BY THE U.S. NINTH CIRCUIT TO PETITIONER'S 28 U.S.C. 2254 PETITION FILED PRIOR TO THE EFFECTIVE DATE OF THE ANTITERRORISM AND EFFECTIVE DEATH PENALTY ACT OF 1996; *LINDH V. MURPHY* 521 U.S. ___, 117 S.Ct. 2059, 2068, 138 L.Ed.2d 481 (1997); *JEFFRIES V. WOOD*, 114 F.3d 1484, 1499 (9th CIR.) CERT. DENIED, ___ U.S. ___, 118 S.Ct. 586, 139 L.Ed.2d 423 (1997) 12

TABLE OF CONTENTS – Continued

Page

II. CERTIORARI SHOULD BE GRANTED TO RESOLVE A CONFLICT IN THE UNITED STATES CIRCUIT COURTS WHETHER 28 U.S.C. 2253(c)(2) SETS A HIGHER STANDARD THAT AN APPELLANT MUST MEET TO SECURE A "CERTIFICATE OF APPEALABILITY" RATHER THAN THAT EXISTING TO SECURE A "CERTIFICATE OF PROBABLE CAUSE" UNDER THE PREVIOUSLY EXISTING 28 U.S.C. 2253; SEE *LENNOX V. EVANS*, 87 F.3d 431, 433-434 (10th Cir. 1996) VIS-A-VIS *WILLIAMS V. CALDERON*, 83 F.2d 281, 286 (9th Cir. 1996) 16

III. CERTIORARI SHOULD BE GRANTED TO RESOLVE THE STANDARDS FOR GRANTING A CERTIFICATE OF APPEALABILITY UNDER 28 U.S.C. 2253(c)(2) AND TO RULE THAT PETITIONER'S CASE PRESENTS A SUBSTANTIAL SHOWING OF THE DENIAL OF SEVERAL CONSTITUTIONAL RIGHTS: (A) TO REQUIRE A STATE COURT SENTENCE TO CONFORM TO UNITED STATES CONSTITUTIONAL MANDATES SUPPORTED BY SWORN TRIAL EVIDENCE RATHER THAN THE OPINION OF A NON-SWORN, NON-TESTIFYING, NON-CROSS-EXAMINED PROBATION OFFICER; (B) TO REQUIRE A STATE COURT "SLOW PLEA OF GUILTY" TO CONFORM TO THE ADVISEMENT OF RIGHTS REQUIRED BY *BOYKIN V. ALABAMA*, 395 U.S. 238 (1969); AND (C) TO REQUIRE UNITED STATES DISTRICT COURTS TO RESPOND IN WRITING TO OBJECTIONS TO RECOMMENDED DENIAL OF 28 U.S.C. 2254 PETITIONS, WHERE SAID OBJECTIONS CLEARLY POINT OUT THE ERRORS OF A UNITED

TABLE OF CONTENTS – Continued

Page

STATES MAGISTRATE JUDGE IN THE RECOMMENDED DENIAL, BEFORE A UNITED STATES DISTRICT JUDGE SUMMARILY SIGNS AN ORDER ADOPTING THE RECOMMENDATION DENYING THE RELIEF SOUGHT IN 28 U.S.C. 2254 17

A. The Imposition of Consecutive Sentence Error 17

B. The error under *Boykin v. Alabama*, 395 U.S. 238, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969) 20

Conclusion 23

TABLE OF AUTHORITIES

Page

CASES

Boykin v. Alabama, 395 U.S. 238 (1969) ..... *passim*

Jeffries v. Wood, 114 F.3d 1484 (9th Cir. 1997) 12

Lennox v. Evans, 87 F.3d 431 (10th Cir. 1996) 11, 16

Lindh v. Murphy, 521 U.S. ___ (1997) 12, 13

People v. Foley, 170 Cal.App.3d 1039 (1985) 6

People v. Riffey, 171 Cal.App.3d 419 (1985)..... 6

Williams v. Calderon, 83 F.3d 281 (9th Cir. 1996).....11, 14, 16

FEDERAL STATUTES

28 U.S.C. 2253.....1, 11, 12, 14, 16

28 U.S.C. 2253(c)(2)..... *passim*

28 U.S.C. 2254..... *passim*

STATE STATUTES

California Penal Code 667.6(d)..... 4, 5, 7, 8, 14, 18

PETITION FOR WRIT OF CERTIORARI

To the Honorable William H. Rehnquist, Chief Justice of the United States, and to the Honorable Associate Justices of the United States Supreme Court:

Dale Wayne Bestelmeyer, petitioner, seeks a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit from the Order of that Court filed July 7, 1998 and entered on July 15, 1998 denying a "Certificate of Appealability", although the standard was then a "Certificate of Probable Cause" pursuant to 28 U.S.C. 2253, said Denial precluding resolution on appeal of his 28 U.S.C. 2254 denial to the United States Court of Appeals on the merits.

OPINION BELOW

The United States District Court for the Central District of California entered its recommendation that petitioner's 28 U.S.C. 2254 petition be denied (U.S. Magistrate Judge Arthur Nakazato) on February 26, 1998.

On or about March 13, 1998 petitioner filed a detailed Objection to that recommendation, pointing out key and seriously consequential errors in that recommendation of Denial.

On or about March 25, 1998 U.S. District Judge Mariana R. Pfaelzer summarily adopted the recommended denial without addressing whatsoever the key errors. Copies of the U.S. Magistrate Recommendation appears as Appendix "A" while the Adoption Order of the U.S. District Court appears as Appendix "B". Following the

filing of the Notice of Appeal on April 20, 1998, petitioner sought from the U.S. District Court a "Certificate of Probable Cause to Appeal." The Order Denying, on May 9, 1998, that application appears as Appendix "C", the District Court correctly noting in footnote 1 that the Antiterrorism and Effective Death Penalty Act of 1996 did not apply to the instant petition under 28 U.S.C. 2254 filed on March 4, 1996; thus a "Certificate of Probable Cause" rather than a "Certificate of Appealability" was the proper vehicle.

Thereafter the United States Court of Appeals for the Ninth Circuit erroneously denied the issuance of a "Certificate of Appealability" under 28 U.S.C. 2253(c)(2), on July 7, 1998, which was entered on July 15, 1998. The proper standard was a Certificate of Probable Cause, as seen in Appendix "C", footnote 1. A copy of that Order appears as Appendix "D".

JURISDICTIONAL GROUNDS

(i) The United States Court of Appeals for the Ninth Circuit denied a "Certificate of Appealability" from a recommended Denial of petitioner's 28 U.S.C. 2254 petition on July 7, 1998, entered July 15, 1998. Copies of the relevant Magistrate Judge Recommendation and subsequent District and Circuit Court orders appear as Appendices "A", "B", "C" and "D" respectively.

(ii) Jurisdiction to Review a Final Decision of a United States Circuit Court by Certiorari is provided under 28 U.S.C. 1254.

U.S. CONSTITUTIONAL PROVISIONS INVOLVED

AMENDMENT V.

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

AMENDMENT VI.

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

AMENDMENT XIV.

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall

make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

UNITED STATES STATUTES INVOLVED

28 U.S.C. 2253(c)(2):

A Certificate of Appealability may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right.

CALIFORNIA STATE STATUTES INVOLVED AT THE TIME OF SENTENCING PETITIONER IN 1984

P.C. 667.6(d):

A full, separate, and consecutive term shall be served for each violation of subdivision (2) or (3) of Section 261, Section 264.1, subdivision (b) of Section 288, Section 289, or of committing sodomy or oral copulation in violation of Section 286 or 288a by force, violence, duress, menace, or threat of great bodily harm if such crimes involve separate victims or involve the same victim on separate occasions.

STATEMENT OF THE CASE

Petitioner Bestelmeyer was charged with and convicted of multiple counts of sexual activities with a minor step-daughter in 1984. A jury trial was waived and the

case was submitted to the Court largely on the preliminary hearing transcript with some additional testimony not consequential to the issues here raised.

The sexual activities, conducted in the usual privacy, produced only the alleged victim as a witness, who testified, in general, to non-violent behavior of petitioner whom she claimed to have a non-defined "fear of." At no time did she testify, nor did any evidence support, that petitioner made any threat to do great bodily harm to the victim. At the time of the offense, "fear of immediate and unlawful bodily injury" would support one necessary element to convict a defendant of the enumerated sex offenses, but consecutive sentencing of those offenses could not occur unless a "threat of great bodily harm" was demonstrated to exist beyond a reasonable doubt. Thus there was a fatal and recognized dichotomy in California sex offense sentencing, that precluded consecutive sentencing, unless it be shown that the crimes were committed with "force, violence, duress, menace, or threat of great bodily harm", while conviction could occur if it be established beyond a reasonable doubt that the crimes were committed with "force, violence, duress, menace, or fear of immediate and unlawful bodily injury." To be sure, the disjunctive array of the 5 terms would allow establishment of either conviction, or sentence under P.C. 667.6(d), if any one of "force, violence, duress, or menace" was established, but this case is

distinguished by the trier of fact, the judge, overtly failing to find that any one of them existed, and only ultimately reading into the record at sentencing that he would sentence consecutively because the post-trial probation officer's report stated that the crimes had all occurred *"with violence and a threat of harm."* See the California appellate cases deciding this key issue: *People v. Foley*, 170 Cal.App.3d 1039 (1985) and *People v. Riffey*, 171 Cal.App 3d 419 (1985).

At appendix A-24 the U.S. Magistrate Judge, in addressing petitioner's attack on consecutive sentencing in the 28 U.S.C. 2254 petition erroneously stated:

> "At the time of sentencing, the trial court, who also acted as the fact finder in determining petitioner's guilt, specifically stated that every count petitioner was convicted of came within Section 667.6(d) because the acts were committed with *force* and *violence*. (R.T. 594, 605). In particular, the Court stated: 'This applies to all counts that the Court is going to impose sentence on – the crimes involved violence and a threat of harm which discloses a high degree of cruelty and callousness in the part of the defendant.' " (R.T. 605)

In fact, and in truth, and in searching the entire record, the Court did not personally make the required findings, but instead merely quoted from the post-trial non-evidentiary, non-confronted, non-cross-examined probation report in deciding to sentence consecutively; it is important to recognize that the U.S. Magistrate Judge did not realize that these were not beyond reasonable doubt findings of the Court, but were just the court

reading from the probation report. At R.T.A. 604, line 25, the Court in fact stated:

> "Insofar as whether the defendant should be sentenced on the separate counts consecutive or concurrent to either the aggravated term, the midterm, or the low term, the Court notes the following terms in aggravation and mitigation. *And I'm quoting mainly from the probation officer's report here on page 14*".
>
> "First of all – and this applies to all counts that the Court is going to impose sentence on – the crimes involved *violence* and a *threat of harm* which discloses a high degree of cruelty and callousness on the part of the defendant . . . "

It is to be noted that a "threat of harm" is not the required threat of *"great bodily harm"* required by P.C. 667.6(d), and the record is devoid of any *evidence whatsoever of any threat at all*. Moreover, the victim repetitively stated that petitioner was not violent to her, she submitting because of an ill-defined "fear" of petitioner. It is this subjective fear, if meeting the specific codified fear level, which would support a conviction but "fear" could never support any conviction absent finding it to be a specific "fear of immediate and unlawful bodily harm." In any event, "fear" cannot be transmogrified into the required overt "threat of great bodily harm" to sentence consecutively under P.C. 667.6(d).

Secondly, none of the other possible grounds, i.e., "force", "duress" or "menace" were found to be true in this Court trial by the Court or by the probation report.

Thus there exists a severe 6th and 14th Amendment problem in that a non-confronted, non-testifying, non-

judicial probation officer purports to make the key findings of elements of the crime in order to sentence consecutively and this clearly violates the 6th and 14th Amendments, and the Court mechanically adopts/ uses/ reads into the record this basis for sentencing.

Violence is defined by at least one recognized standard dictionary as "physical force used so as to injure, damage, or destroy", i.e., a "devastatingly or explosive powerful force or energy", or "vehemence" or "fury". (Webster's New World Dictionary).

The record at bar failed to show any sworn testimony that "violence" occurred in the very high majority of contact between petitioner and the victim, nor were any *threats* whatsoever used, nor surely the required "threat of great bodily harm" in order to sentence consecutively under California Penal Code Sections 667.6(c) or (d). The *only* mention of this "violence" concept was found in the post-trial probation officer's report prepared by a probation officer who was not a witness at the trial and where this record fails to show any source or evidence for such a false and evidently misunderstood conclusion by this author. Specifically, the record shows in the testimony of the victim at the preliminary hearing the following:

(1) On an incident in a bedroom at the home initiated *without force* (see C.T.A. 402), the victim *walked into the bedroom* "because it scares me, and if I didn't I was afraid something might happen to me or something." (C.T.A. 403, lines 10-11). Petitioner told the victim that he would "make her feel good," never threatened her or used violence.

(2) On a second occasion that same day the victim went back into the room, walking on her own initiative, "because I was afraid something might happen to me" (C.T.A. 405, lines 6-10) (Court sustained objections to leading prosecution phrased questions indicating that petitioner "took" the victim into the bedroom; see C.T.A. 406, line 28-C.T.A. 407, lines 1-5).

(3) On a third occasion involving sodomy of the victim, she engaged in the act because "I was afraid if I didn't he'd do something to me" (C.T.A. 413, line 28-C.T.A. 414, lines 1-2). At line 8, C.T.A. 414: "I was afraid something might happen to me."

(4) During an incident when her mother was in New York, the victim complied because "I was afraid something might happen to me." (C.T.A. 417, lines 5-10).

(5) At C.T.A. 461, the victim stated that she engaged in the activity "because she was afraid of her stepfather," and "was afraid he could get mad and do something to me." (lines 15-17; lines 25-26).

Petitioner, via counsel, specifically pointed out these errors of the Magistrate Judge and also pointed out the above trial transcript citations which did not establish *violence*, nor did it establish any threats, nor did it establish the *required fear*. Petitioner challenged the Magistrate Judge and/or the District Judge to correct the recommended denial of Appendix A to accurately reflect that no *threats* occurred, that the *required fear* was not shown and that the Court never specifically found the elements of "force", "duress", or "menace", and that, save for minor contacts, no "violence" occurred.

No correction nor no response was obtained, the District Court summarily signing the *Denial* order.

A sought "Certificate of Probable Cause" was denied, the District Judge asserting that no "denial of federal rights" had occurred in this record.

The U.S. 9th Circuit elevated a denial on the non-applicable "Certificate of Appealability" standard which did not apply to this case filed March 4, 1996, before the Antiterrorism and Effective Death Penalty Act of 1996 occurred.

REASONS FOR GRANTING CERTIORARI

1. To explicate and set guidelines requiring U.S. District Judges to address and resolve, prior to final ruling, clearly pointed out errors of constitutional magnitude contained in an objection to a recommended denial of a 28 U.S.C. 2254 petition, made by a U.S. Magistrate Judge, that recommended denial containing the explicitly documented errors.

2. To explicate and fix guidelines setting the threshold levels that need to be shown under 28 U.S.C. 2253(c)(2) to cause the issuance of a "Certificate of Appealability" to allow full appeal on the merits of the denial of a 28 U.S.C. 2254 petition by a state prisoner – petitioner to the U.S. Circuit Court following advent of the Antiterrorism and Effective Death Penalty Act of 1996, and to affirm that said act does not apply to 28 U.S.C. 2254 petitions filed prior to the date of its becoming law.

3. To resolve a conflict in the U.S. Circuit Courts whether a "Certificate of Appealability" under 28 U.S.C. 2253(c)(2) requires a criminal defendant to demonstrate a higher level of substantial showing of denial of federal/ constitutional rights than previously required for a "Certificate of Probable Cause" under 28 U.S.C. 2253; compare *Williams v. Calderon* 83 F.3d 281, 286 (9th Cir. 1996) with *Lennox v. Evans,* 87 F.3d 431, 434 (10th Cir. 1996).

4. To resolve whether the requirements of *Boykin v. Alabama,* 395 U.S. 238, 243 (1969), apply to so-called "slow pleas of guilty", where conviction of charges is virtually a certainty, as occurred at bar.

5. To resolve the key issue under the Sixth and Fourteenth Amendments whether post-trial probation reports can ever be used to determine elements affecting sentence levels imposed by State Courts, where, as here, the author of the probation report has never been a sworn witness at trial and has no judicial powers under the law of California.

ARGUMENT I

CERTIORARI SHOULD BE GRANTED BECAUSE: (A) THERE IS A NEED TO EXPLICATE WHETHER 28 U.S.C. 2253(c)(1)(2)(3) ALTERED THE PREVIOUS STANDARDS OF 28 U.S.C. 2253 REGARDING REQUIRING A "CERTIFICATE OF APPEALABILITY" RATHER THAN A "CERTIFICATE OF PROBABLE CAUSE" AND (B) THE NEW LEGISLATION OF 28 U.S.C. 2253(c)(1)(2)(3) WAS ERRONEOUSLY APPLIED BY THE U.S. NINTH CIRCUIT TO PETITIONER'S 28 U.S.C. 2254 PETITION FILED PRIOR TO THE EFFECTIVE DATE OF THE ANTITERRORISM AND EFFECTIVE DEATH PENALTY ACT OF 1996; *LINDH V. MURPHY*, 521 U.S. ___, 117 S.Ct. 2059, 2068, 138 L.Ed.2d 481 (1997); *JEFFRIES V. WOOD*, 114 F.3d 1484, 1499 (9th CIR.) CERT. DENIED, ___ U.S. ___, 118 S.Ct. 586, 139 L.Ed.2d 423 (1997).

28 U.S.C. 2253, formerly governing Appeal to the Circuit Courts by state prisoners following denial of a 28 U.S.C. 2254 petition, provides in relevant part:

> "An appeal may not be taken to the Court of Appeals from the final order in a habeas corpus proceeding where the detention complained of arises out of a process issued by a State Court, unless the justice or judge who rendered the order *or a Circuit justice* or *judge*, issues a certificate of probable cause."

It is clear that this statute provides no guidelines or requirements that the prospective appellant must meet to convince the District Judge *or a Circuit Judge* to grant the "Certificate of Probable Cause."

However, 28 U.S.C. 2253(c)(1)(2)(3) was enacted to require a "Certificate of Appealability", which did specifically set guidelines:

(c)(1). Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the Court of Appeals from . . .

(A) The final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State Court; or

(B) . . .

(2) A certificate of appealability may issue under paragraph (1) *only if the applicant has made a substantial showing* of the denial of a constitutional right.

(3) The certificate of appealability under paragraph (1) shall indicate which specific issue or issues shall satisfy the showing required by paragraph (2)."

It is clear that the District Court order denying the "Application for Certificate of Probable Cause" *correctly* recognized that the old 28 U.S.C. 2253 provision applied rather than 28 U.S.C. 2253(c)(1)(2)(3), as noted in footnote 1, Appendix C.

However, on action by the United States Court of Appeals for the Ninth Circuit, a "Certificate of Appealability" was Denied, specifically citing 28 U.S.C. 2253(c)(2). See Appendix D to this Petition.

It is clear that the Circuit Court erroneously applied the new 2253(c)(2) legislation which specifically set higher standards that must be met by the appellant, and that new legislation was ruled to be non-retroactive in *Lindh v. Murphy*, 521 U.S. ___, 117 S.Ct. 2059, 2068, 138 L.Ed.2d 481 (1997) by this Honorable Court.

In fact, the very United States Ninth Circuit which denied the "Certificate of Appealability" in this case has previously ruled that "the standard for obtaining a Certificate of Appealability under the Act is more demanding than the standard for obtaining a Certificate of Probable Cause under the law as it existed prior to enactment of the Act." *Williams v. Calderon*, 83 F.3d 281, 286 (9th Cir. 1996).

Therefore, the Circuit Court erred in Denying a "Certificate of Appealability." In short, the Circuit Court must apply what it believes to be less rigorous standards for the Certificate of Probable Cause.

Certiorari should be granted, therefore, to explicate the new standards vis-a-vis the former standards and to make clear that the former 28 U.S.C. 2253 applies to appeal application certificates for 2254 petitions filed prior to the effective date of the AEDPA.

The terse Order of Denial of a "Certificate of Appealability" makes no recognition that the correct standard is that of the old 2253, which sets no criteria.

As set forth elsewhere in Argument III of this petition, appellant makes the substantial showing that his sentencing process in state court was based on the trial court adopting language from a post-trial, non-confronted, non-cross-examined probation officer's report rather than the specific rulings of the judge in this trial by waiver of jury. In other words, while the trial judge could *convict* under the language of the specific criminal statutes, that same judge could not *sentence consecutively* under California Penal Code 667.6(d) unless certain items were met that were coincidental with the items to convict,

and appellant asserts that the U.S. District Court erroneously overlooked that fact, i.e., that the State trial court made no such findings save by reading into the record what a non-present at trial, non-testifying, non-confronted probation officer had written in a post-trial probation report. This is an issue that surely is "debatable among jurists of reason", or that a "Court of Appeal could resolve differently" or is "an adequate issue to deserve encouragement to proceed further."

Secondly, as set forth in Argument III, this petition, a sincere and severe issue is demonstrated under the general requirements of *Boykin v. Alabama*, 395 U.S. 238, 23 L.Ed.2d 274, 89 S.Ct. 1709 (1969).

Certiorari should be granted, therefore, to clearly enunciate the demarcation between the here applicable "Certificate of Probable Cause" and the non-applicable "Certificate of Appealability," and to recognize that petitioner-appellant has demonstrated substantial issues to warrant appellate examination by the United States Circuit Court.

ARGUMENT II

CERTIORARI SHOULD BE GRANTED TO RESOLVE A CONFLICT IN THE UNITED STATES CIRCUIT COURTS WHETHER 28 U.S.C. 2253(c)(2) SETS A HIGHER STANDARD THAT AN APPELLANT MUST MEET TO SECURE A "CERTIFICATE OF APPEALABILITY" RATHER THAN THAT EXISTING TO SECURE A "CERTIFICATE OF PROBABLE CAUSE" UNDER THE PREVIOUSLY EXISTING 28 U.S.C. 2253; SEE *LENNOX V. EVANS*, 87 F.3d 431, 433-434 (10th Cir. 1996) VIS-A-VIS *WILLIAMS V. CALDERON*, 83 F.2d 281, 286 (9th Cir. 1996).

As shown in Argument I, supra, Petitioner Bestelmeyer was denied a "Certificate of Appealability" by two Judges of the United States Ninth Circuit while it was clear that the older 28 U.S.C. 2253 standards governed his threshold showing (Certificate of Probable Cause). See Appendix C-2, Footnote 1.

In parallel, the United States Ninth Circuit has held that a *higher standard*, i.e., a more "demanding" showing, must be made to secure the Certificate of Appealability, (*Williams v. Calderon*, 83 F.2d 281, 286 (9th Cir. 1996), and thus has elevated the level for this petition erroneously. There is a clear conflict in the Circuits on this key point. Compare *Lennox v. Evans*, 87 F.3d 431, 433-434 (10th Cir. 1996).

In view of this conflict in the Circuits on this key issue, Certiorari to the United States Ninth Circuit should be granted.

ARGUMENT III

CERTIORARI SHOULD BE GRANTED TO RESOLVE THE STANDARDS FOR GRANTING A CERTIFICATE OF APPEALABILITY UNDER 28 U.S.C. 2253(c)(2) AND TO RULE THAT PETITIONER'S CASE PRESENTS A SUBSTANTIAL SHOWING OF THE DENIAL OF SEVERAL CONSTITUTIONAL RIGHTS: (A) TO REQUIRE A STATE COURT SENTENCE TO CONFORM TO UNITED STATES CONSTITUTIONAL MANDATES SUPPORTED BY SWORN TRIAL EVIDENCE RATHER THAN THE OPINION OF A NON-SWORN, NON-TESTIFYING, NON-CROSS-EXAMINED PROBATION OFFICER; (B) TO REQUIRE A STATE COURT "SLOW PLEA OF GUILTY" TO CONFORM TO THE ADVISEMENT OF RIGHTS REQUIRED BY *BOYKIN V. ALABAMA*, 395 U.S. 238 (1969); AND (C) TO REQUIRE UNITED STATES DISTRICT COURTS TO RESPOND IN WRITING TO OBJECTIONS TO RECOMMENDED DENIAL OF 28 U.S.C. 2254 PETITIONS, WHERE SAID OBJECTIONS CLEARLY POINT OUT THE ERRORS OF A UNITED STATES MAGISTRATE JUDGE IN THE RECOMMENDED DENIAL, BEFORE A UNITED STATES DISTRICT JUDGE SUMMARILY SIGNS AN ORDER ADOPTING THE RECOMMENDATION DENYING THE RELIEF SOUGHT IN 28 U.S.C. 2254.

A. The Imposition of Consecutive Sentence Error.

At the time of petitioner's trial in 1983, all of the sex related violations that petitioner was convicted of required the finder of fact (here a judge in a jury waiver) to find, inter alia, that the crimes were committed by means of *force, violence, duress, menace or fear of immediate and unlawful bodily injury* (*subjective fear,* on the part of the

victim.) However, consecutive sentences were mandated to be imposed if and only if the crimes were committed by force, violence, duress, menace, or *threat of great bodily injury* (by the perpetrator overtly threatening the victim).

At bar a jury was waived and the trial court found petitioner *guilty* of a multitude of offenses without specifying that the Court determined the guilt on one or more of the quartet of "force, violence, duress, or menace," and *did not* find it upon the subjective fear of the victim that she would suffer "immediate and unlawful bodily injury."

Thus this record, in not excluding the fear of immediate and unlawful bodily injury, could permit a conviction on this sole ground, but would not, under P.C. 667.6(d) permit the consecutive sentences imposed by this trial court adding to 129 years in state prison.

Petitioner raised this defect at length and the United States District Court treated it in Appendix A, section D, at pages A-21-A-25 inclusive. The error in the District Court recommended denial occurs at page A-24:

> "At the time of sentencing, the trial court, who also acted as the fact finder in determining the petitioner's guilt, specifically stated that every count Petitioner was convicted of came within section 667.6(d) because the acts were committed with *force and violence*. In particular, the Court stated 'This applies to all counts that the Court is going to impose sentence on – the crimes involved *violence* and a *threat of harm* which discloses a high degree of cruelty and callousness on the part of the defendant.' (R.T. 605)."

However, an examination of the cited R.T. 605 in the official transcript shows that the Court *did not so find,* but instead was quoting a line out of the post-conviction probation report prepared by a probation officer that did not witness this trial, and who was not confrontable as a sworn witness by petitioner and his counsel, and who was surely not a trier of fact or a jurist.

In truth, what the trial court really said was:

> "Insofar whether the defendant should be sentenced on the separate counts consecutive or concurrent to either the aggravated term, the midterm, or the low term, the Court notes the following terms in aggravation and mitigation. *AND I'M QUOTING MAINLY FROM THE PROBATION OFFICER'S REPORT HERE ON PAGE 14*:
>
> > First of all – and this applies to all counts that the Court is going to impose sentence on – the crimes involved *violence* and a *threat of harm* which discloses a high degree of cruelty and callousness on the part of the defendant."

Thus the quoted key language is not a finding of the Court, as it must be to sentence consecutively, but is a quote of a probation officer who heard no evidence, and the trial record discloses no *threats whatsoever* testified to by the victim, let alone a *threat of great bodily harm* as required. Indeed, a *"threat of harm"* does not satisfy the mandatory *threat of great bodily harm*. As well, the record disclosed no *violence at all* in the bulk of all contact between petitioner and the victim. The absence of *violence* or *threat of great bodily harm* was severely challenged in *Filed Objections* to the United States Magistrate's Report

and Recommendation (Appendix A) but the United States District Judge and the Magistrate ignored these cited objections to the trial record, the United States Judge Summarily executing the Order of Denial. (Appendix B).

Petitioner urges, as a reason to grant Certiorari, the publishing of a requirement in 28 U.S.C. 2254 proceedings, that this Court *require* the United States District Courts to address, in writing, a response to Objections that can be determined from the trial record. This error, appearing in Appendix A at page A-24, was severely consequential in denying attack on the huge 129 year sentence imposed on this petitioner as a consequence of illegal consecutive sentences.

Also, as a parallel note, the record did not assert that "force and violence" occurred; it claimed, via the probation officer, that only *"violence"* and *"threat of harm"* occurred. In fact, this record supported neither and petitioner, in his Objections, challenged the United States Magistrate to cite line and page in this record where this occurred, and neither the magistrate nor the District Judge did so, Appendix B being signed summarily.

B. The error under *Boykin v. Alabama*, 395 U.S. 238, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969). See Appendix A, section C, pages A-19-A-21 inclusive.

Appendix A excuses the advisement of the right against self-incrimination and failure to advise petitioner on the huge, potentially greater than 129 year sentence on the conclusion that the procedure was not a so-called "slow plea of guilty." Additional claimed support for this

conclusion is garnered from the fact that the judge acquitted petitioner on a minor number of counts out of the very substantial number actually charged. It is clear, however, that this petitioner stood to be certainly convicted on virtually all of the charges and was so advised on two separate occasions during the taking of the waivers. Initially at R.T.A. 72, line 11, the following appears:

> "Q. Now, based upon the preliminary examination transcript, it is highly likely – in fact I would say it's *almost certain* that you are going to be convicted based upon that testimony.
>
> Do you understand that?
>
> A. Yes."

And at R.T.A. 75, line 14, the admonishment is repeated:

> "Q. Okay. And that based upon the expected testimony of those witnesses and the preliminary examination transcript of your step daughter, that it is highly likely, *if not certain,* you are going to be convicted.
>
> Do you understand that?
>
> A. Yes."

In view of the above certainty of sure conviction on the lion's share of these charges, there is little logical argument that the full panoply of *Boykin* rights should not have been given, including especially advisement of the permissible range of the gargantuan sanction of in excess of 129 years. Such a sanction amounts to, in California, a life sentence with death occurring before any

possible parole. This Court required in *Boykin v. Alabama*, 395 U.S. 238, 243, 23 L.Ed.2d 274, 279, 89 S.Ct. 1709 (1969), that a pleading guilty defendant be advised:

> "Several federal constitutional rights are involved in a waiver that takes place when a plea of guilty is entered in a state criminal trial. First, is the privilege against compulsory self-incrimination guaranteed by the Fifth Amendment and applicable to the States by reason of the Fourteenth. *Malloy v. Hogan*, 378 US 1, 12 L.Ed. 2d 653, 84 S.Ct. 1489. Second, is the right to trial by jury. *Duncan v. Louisiana*, 391 US 145, 20 L.Ed. 2d 491, 88 S.Ct. 1444. Third, is the right to confront one's accusers. *Pointer v. Texas*, 380 US 400, 13 L.Ed. 2d 923, 85 S.Ct. 1065. We *cannot presume a waiver of these three important federal rights from a silent record.*"

That advisement of the permissible range of sentences is likewise required as shown in footnote 7 at 395 U.S. 238, 244:

> "A majority of criminal convictions are obtained after a plea of guilty. If these convictions are to be insulated from attack, the trial court is best advised to conduct an on the record examination of the defendant which should include, inter alia, an attempt to satisfy itself that the defendant understands the nature of the charges, his right to a jury trial, the acts sufficient to constitute the offenses for which he is charged and *the permissible range of sentences.*" *Commonwealth ex rel. West v. Rundle*, 428 Pa. 102, 105-106, 237 A.2d 196, 197-198 (1968)."

It is conceded that petitioner was not advised by the Court of this huge potential sanction at the time of taking

of the so-called "slow pleas" based on virtual certainty of conviction, nor was petitioner *ever* advised of his right against self-incrimination. *Boykin's* clear provisions were thus violated and Certiorari should be granted to insure that these rights are afforded in slow, certain pleas of guilty.

CONCLUSION

Based on all of the foregoing, Certiorari should be granted to the United States Court of Appeals for the Ninth Circuit.

Dated: October 5, 1998

ROGER S. HANSON, ESQ.
Counsel to Petitioner
Member of the Bar
Supreme Court of the
United States

APPENDIX A

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

WESTERN DIVISION

DALE WAYNE BESTELMEYER, Petitioner, v. IVALEE HENRY, Warden, et al., Respondents.	Case No. CV 96-1496-MRP (AN) REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE (Filed Febr. 26, 1998)

This report and recommendation is submitted to the Honorable Marianna R. Pfaelzer, United States District Judge, pursuant to 28 U.S.C. 636 and General Order 194 of the United States District Court for the Central District of California. For the reasons discussed below, the magistrate judge recommends that the Petition be denied and dismissed with prejudice.

I. PROCEEDINGS

On March 4, 1996, Dale Wayne Bestelmeyer ("Petitioner"), a state prisoner, filed this Petition for Writ of Habeas Corpus ("Petition"). The Petition raises five grounds for relief challenging Petitioner's January 26, 1983, conviction and sentence in Ventura County Superior Court case number CR-17765 on 25 counts of a variety of sexual offenses, which included oral copulation, sodomy

and lewd acts with a child. [Petition ¶¶ 2a-e; Clerk's Transcript ("CT") 63-71, 150-152.] Petitioner is presently serving a 129-year sentence in state prison. [*Id.* ¶ 2e; CT 166.]

On June 3, 1996, Respondents filed an Answer to the Petition addressing the merits of Petitioner's first claim and contending that he procedurally defaulted on the remaining four claims.[1] On July 16, 1996, Petitioner filed a Traverse. On January 14, 1997, the Court ordered further briefing on the merits of Claims 2 through 5. On February 10, 1997, Respondents filed a Supplemental Answer. Petitioner filed a Supplemental Traverse on February 28, 1997.

II. PETITIONER'S CONTENTIONS

Petitioner asserts the following grounds for federal habeas corpus relief:

1. Petitioner's constitutional rights were violated when police continued questioning him after he asserted his right to an attorney [Petition ¶ 10a];

---

[1] Respondents further contend that amendments to the federal habeas provisions made by the Antiterrorism and Effective Death Penalty Act ("AEDPA") apply to this action. [*See* Answer at 11-14.] However, the present Petition was filed shortly before the effective date of the AEDPA, and it is now settled that the AEDPA amendments are not applicable to petitions pending on the date of enactment. *Lindh v. Murphy*, ___ U.S. ___, 117 S.Ct. 2059, 2068, 138 L.Ed.2d 481 (1997); *Jeffries v. Wood*, 114 F.3d 1484 (9th Cir.), *cert. denied*, ___ U.S. ___, 118 S.Ct. 586, ___ L.Ed.2d ___ (1997).

2. The trial court erred in failing to advise Petitioner of his right against self-incrimination and the maximum possible sentence under *Boykin* and Tahl when Petitioner agreed to submit part of his case on the transcript of his stepdaughter's preliminary hearing testimony [*id.* ¶ 10b];

3. Consecutive sentences were imposed in violation of Cal. Pen. Code §§ 667.6(c) and (d) [*id.* ¶ 10c];

4. Petitioner's trial counsel and appellate counsel rendered ineffective assistance by failing to challenge the imposition of consecutive sentences under Cal. Pen. Code §§ 667.6(c) and (d) [*id.* ¶ 10d]; and

5. Petitioner's 129-year sentence is excessive and illegal [*id.* ¶ 10e].

III. FACTUAL BACKGROUND

In 1982, Petitioner was arrested and charged with committing various sexual assaults against his ten-year old stepdaughter between January 1, 1981, and August 17, 1982. [CT 63-71.] Petitioner entered a dual plea of not guilty and not guilty by reason of insanity. [CT 105.] Petitioner waived his right to a jury trial, and the matter was tried by the court.[2] [Reporter's Transcript ("RT") 67-78.] Petitioner also waived his right to confront his stepdaughter at trial and, instead, agreed to allow the

---

[2] The trial court explained that the trial would be conducted in two phases; the first phase would determine whether Petitioner was guilty of the charged offenses, and the second phase would determine his sanity at the time the offenses were committed. [RT 69-70.]

prosecution to submit her preliminary hearing testimony in lieu of her live testimony. [RT 70-72.]

The trial court found Petitioner guilty of 25 of the 33 counts charged.[3] [*See* RT 226-257, 284-318.] The trial court also found true four special allegations. [RT 319-321] At the conclusion of the sanity phase of the trial, the court found that Petitioner was sane at the time he committed the offenses. [RT 577, 579.] The court sentenced Petitioner to the mid-term on all but two of the 25 guilty counts and, with the exception of Counts 2 and 3 and Counts 5, 6 and 7,[4] ordered that the sentences run consecutively pursuant to Cal. Pen. Code § 667.6(d), for a total term of 129 years. [RT 608-611.] The judgment was affirmed on appeal.[5] [Answer, Ex. A at 31-53.]

IV. DISCUSSION

A. Procedural Default

Respondents contend that Petitioner procedurally defaulted on Claims 2 through 5. [Answer at 19-25.]

---

[3] Petitioner was found not guilty of Counts 1, 13, 17, 20, 25, 27, 28 and 32. [RT 318.]

[4] Counts 2 and 3 involved the same incident and were ordered to run concurrently. [RT 607.] Counts 5, 6 and 7 also involved the same incident and were ordered to run concurrent with each other, but consecutive to Count 2. [*See* RT 608.]

[5] *See also People v. Bestelmeyer*, 166 Cal.App.3d 520, 212 Cal.Rptr. 605 (1985). In a petition for review to the state supreme court, Petitioner raised the *Miranda* violation issue and challenged his sentence on the basis that it constituted cruel and unusual punishment. [*See* Answer, Ex. B at 58-59.] The petition for review was summarily denied without comment or citation to case authority. [*See id.*, Ex. C at 78.]

However, as discussed below, Petitioner has not procedurally defaulted on these claims.

1. Standard for Interpreting State Court Opinions

A procedural bar occurs when a habeas petitioner fails to meet a state's procedural requirements for presenting his federal claims, thus depriving the state courts of an opportunity to address those claims on the merits. *Coleman v. Thompson*, 501 U.S. 722, 731-732, 111 S.Ct. 2546, 115 L.Ed.2d 640 (1991). Generally, when a state court clearly denies a habeas petition for failure to comply with a state procedural rule, federal habeas relief is not available. *Id.* at 729; *Wells v. Maass*, 28 F.3d 1005, 1008 (9th Cir. 1994). In applying this rule, the Court must first examine the basis of the relevant state court judgment. *See id.* at 732-35; *Wells v. Maass*, 28 F.3d at 1008; *Hunter v. Aispuro*, 982 F.2d 344, 347 (9th Cir. 1992), *cert. denied*, 510 U.S. 887, 114 S.Ct. 240, 126 L.Ed.2d 194 (1993).

The process begins by looking at the latest order by the state's highest court denying a petition; this Court need look no further if that order is clear. An order is clear if it expressly states that the denial was on state procedural grounds, or if the order cites state authority "indicating that the habeas petition was procedurally deficient." *Hunter v. Aispuro*, 982 F.2d at 347.

If the state's highest court denies a habeas petition without comment and without explanatory state authority, this Court must then look through the unexplained order to the last reasoned lower court decision and assume that the state supreme court's decision was on the

same ground. *Ylst v. Nunnemaker*, 501 U.S. 797, 803, 111 S.Ct. 2590, 115 L.Ed.2d 706 (1991). If the last reasoned state decision relied on an independent and adequate state procedural ground, then this Court will treat the petitioner's claims as procedurally barred. *Coleman v. Thompson*, 501 U.S. at 735; *Siripongs v. Calderon*, 35 F.3d 1308, 1316-1317 (9th Cir. 1994), *cert. denied*, 513 U.S. 1183, 115 S.Ct. 1175, 130 L.Ed.2d 1127 (1995). If the last reasoned state decision denying the petition did not clearly rely on an independent and adequate state procedural ground, then this Court will treat the denial as being on the merits and thus treat the claims as not procedurally barred. *Id.; Hunter v. Aispuro*, 982 F.2d at 347; *Siripongs v. Calderon*, 35 F.3d at 1317.

2. Interpreting the State Court Opinions in this Case

a. 1992 State Habeas Petition

In 1986, Petitioner filed a habeas petition in the state superior court raising Claim 3. [Answer, Ex. D at 79-191.] The petition was apparently denied.[6] In October 1992, Petitioner filed a petition in the state court of appeal again raising Claim 3 plus Claim 4. [Answer, Ex. F at 205-216.] The state court of appeal gave the following reasons for denying the petition:

---

[6] A copy of the state superior court decision denying the petition has not been lodged or filed with this Court. However, neither party disputes that the petition was denied. [Answer at 6; Petition ¶ 7a(4).]

> We have read and considered the petition for writ of habeas corpus.
>
> Petitioner failed to seek review by way of appeal of the issues that are tendered in this petition. Habeas is generally not available where one forsakes his remedies at law. (See *In re Terry* (1971) 4 Cal.3d 911, 921; *In re Dixon* (1953) 41 Cal.2d 756.) Nor has petitioner given any reason why he waited 4 years after the denial of his habeas petition to seek further appellate review. (See *In re Swain* (1949) 34 Cal.2d 300, 304.)
>
> We deny the petition. (See also *People v. Simpson* (1992) 2 Cal.App.4th 228, 233-237; *Hunter v. Aispuro* (9th Cir. 1992) 958 F.2d 955, 959-960.)

[Answer, Ex. G at 220-221.]

On December 10, 1992, Petitioner filed a habeas petition in the California Supreme Court seeking to nullify his alleged illegal sentence and contending that consideration of the consecutive sentencing issue (Claim 3) should not be foreclosed on habeas review because the cases Petitioner was relying on were decided after the date he was sentenced. [*See* Answer, Ex. H at 225-226.] He also challenged the application of *Swain*. [*Id.*, Ex. H at 226.] The California Supreme Court decision denying the 1992 habeas petition read, in its entirety, as follows: "Petition for review DENIED on the merits. Mosk, J. is of the opinion the petition should be granted." [*Id.*, Ex. I at 236.]

b. 1993 Federal Habeas Petition

Petitioner next filed a federal habeas petition which was dismissed without prejudice because some of the claims (Claims 2 and 4) were not exhausted.[7] [*See* Answer, Exs. J-L at 237-259.] On January 10, 1994, the magistrate judge filed a Report and Recommendation ("R&R"). The R&R states that Claims 2 and 4 had not been presented to the California Supreme Court. [*See* Answer, Ex. K at 256.] This finding was based on California Appellate Rule 28(e)(2),[8] (5)[9] and Petitioner's failure

---

[7] Pursuant to F.R.Evid. 201, the Court takes judicial notice of its own records and files in *Dale Wayne Bestelmeyer v. Ivalee Henry, Warden, et al.*, case number CV 93-5801-HLH(S).

[8] Rule 28(e)(2) provides, in pertinent part, that "[o]nly issues set forth in the petition and answer or fairly included in them need by considered by the court." Rule 28(e)(2), Cal.Rules Sup.Ct. & Cts. of Appeal. Prior to the addition of this language to Rule 28, the omission of claims from a petition for review did not necessarily bar federal review because when the California Supreme Court granted a petition for review it would vacate the state court of appeal's decision and review all of the issues raised on the first appeal whether actually raised on a petition for review or not. *See Maxwell v. Sumner*, 673 F.2d 1031, 1043 & n.1 (9th Cir.) (en banc), *cert. denied*, 459 U.S. 976, 103 S.Ct. 313, 74 L.Ed.2d 291 (1982). The Ninth Circuit later found that the 1985 amendment to Rule 28 instructing litigants that the court need only consider issues that were actually raised in the petition invalidated the *Maxwell* rule. *See McGuire v. Estelle*, 902 F.2d 749, 753 N.1 (9th Cir. 1990), *reversed on other grounds*, 502 U.S. 62, 112 S.Ct. 475, 116 L.Ed.2d 385 (1991).

[9] Rule 28(e)(5) provides, in pertinent part, that "[t]he petition shall be a single document[,] . . . [and that] [n]o authorities or argument may be incorporated by reference from another document into the petition." Rule 28(e)(5), Cal. Rules Sup.Ct. & Cts. of Appeal.

to include, rather than merely refer to, each of the claims raised in the prior state proceedings in his petition to the state supreme court. [*Id.*, Ex. K at 256-257.] This Court disagrees with that finding to the extent that, upon close examination of the record in this action, it finds that Claim 4 – challenging counsels' failure to raise the illegal sentence issue – was raised in Petitioner's 1992 habeas petition to the California Supreme Court. [*See id.*, Ex. H at 225-227.]

c. 1994 State Habeas Petition

Consequently, Petitioner returned to state court and filed a second habeas petition with the California Supreme Court. [*See* Answer, Ex. M at 260-292.] In addition to asserting Claims 3 and 4, which were raised in his 1992 habeas petition, Petitioner also raised Claim 2 (slow guilty plea). [*Id.*, Ex. M at 273.] The California Supreme Court summarily denied the petition "on the merits and for lack of diligence."[10] [*Id.*, Ex. N at 293.]

The California Supreme Court decision denying Petitioner's first 1992 habeas petition, though brief, was a clear denial on the merits; therefore, a procedural bar was not applied to Claim 4.

---

[10] However, Justice Mosk was of the opinion that an order to show cause should issue. [Answer, Ex. N at 293.]

3. Analysis of Claims 2 and 4

Respondents assert that this Court is barred from reviewing Claims 2 and 4 because they were raised for the first time in Petitioner's second 1994 state habeas petition to the California Supreme Court and denied for lack of diligence. [Answer at 21-22.] Specifically, Respondents argue that Claims 2 and 4 are procedurally barred, in part, because Petitioner's 1993 federal habeas petition was dismissed for lack of exhaustion. [Answer at 21 & Ex. K at 255-257.] They also contend, in other part, that Petitioner failed to include Claims 2 and 4 in his first 1992 habeas petition to the California Supreme Court. *Id.* & Ex. H.]

Determining whether Petitioner procedurally defaulted on Claim 2 is a more difficult matter to decipher. Claim 2 was presented to the California Supreme Court for the first time in Petitioner's 1994 habeas petition. [*See* Answer, Ex. M at 273.] That petition was denied both on the merits and for "lack of diligence."[11] [*Id.*, Ex. N at 293.] Citing to *In re Clark*, 5 Cal.4th 750, 765, 21 Cal.Rptr.2d 509 (1993), *rhg. denied*, and *In re Swain*, 34 Cal.2d 300, 304 (1949), *cert. denied*, 338 U.S. 944, 70 S.Ct. 425, 94 L.Ed. 582 (1950), Respondents argue that a denial for lack of diligence constitutes an independent and adequate state procedural ground barring federal habeas

---

[11] A denial that is based both on the merits and procedural grounds may bar federal habeas review if the state court decision clearly and expressly indicates that the state procedural ground is an alternative holding. *See Sochor v. Florida*, 504 U.S. 527, 534, 112 S.Ct. 2114, 119 L.Ed.2d 326 (1992).

review because California regularly rejects habeas petitions based on a lack of diligence. [*Id.* at 21-22 & n.20.]

Before a state procedural rule can be found to bar federal habeas review, it must first be determined that the rule has been "firmly established and regularly followed" at the time it was applied. *Fields v. Calderon*, 125 F.3d 757, 760 (9th Cir. 1997), *rhg. denied* (citations omitted). "[T]he proper time for determining whether a procedural rule was firmly established and regularly followed is 'the time of [the] purported procedural default.' " *Id.* (quoting *Calderon v. Bean*, 96 F.3d 1126, 1130 (9th Cir. 1996), *cert. denied*, ___ U.S. ___, 117 S.Ct. 1569, 137 L.Ed.2d 714 (1997)). Thus, courts must "examine whether the state courts were regularly and consistently applying the relevant procedural default rule 'at the time the claim should have been raised.' " *Id.* (quoting *Calderon v. U.S. Dist. Court for the Eastern Dist. of California*, 103 F.3d 72, 75 (9th Cir. 1996), *cert. denied*, ___ U.S. ___, 117 S.Ct. 2532, 138 L.Ed.2d 1031 (1997)).

In *Clark*, the California Supreme Court explained that the rule barring collateral review based on the petitioner's delay in raising his claims rests on the longstanding rule that requires "a petitioner explain and justify any significant delay in seeking habeas corpus relief." *In re Clark*, 5 Cal.4th at 765 (citing *In re Swain*, 34 Cal.2d at 302). The court further stated:

> Our past decisions have thereby suggested that the rules against piecemeal presentation of claims . . . are subject to undefined exceptions and that the court may be willing to entertain multiple collateral attacks on a judgment notwithstanding the potential for abusive writ

> practice. As a result, many prisoners present petitions raising claims that are or should be barred. They do so either in the hope that this court will find their claims sufficiently compelling to justify an exception to the rules, or because the possibility that this court will excuse a procedural default makes the petition a necessity in order to exhaust the petitioners' state remedies for purposes of review in federal court.

Id. at 768. The *Clark* court explained further how it would apply the rule of delay to future cases:

> Before considering the merits of a second or successive petition, a California court will ask whether the failure to present the claims underlying the new petition in a prior petition has been adequately explained, and whether that explanation justifies the piecemeal presentation of the petitioner's claims. . . .
>
> . . . A petitioner will be expected to demonstrate due diligence in pursuing potential claims. If a petitioner had reason to suspect that a basis for habeas corpus relief was available, but did nothing to promptly confirm those suspicions, that failure must be justified.

Id. at 775.

Petitioner's default was based on his failure to include all of his claims in his first state habeas petition. That default occurred, at the latest, when he filed his first state habeas petition in the California Supreme Court in 1992 – the year before *Clark* put prisoners on notice as to how California courts would apply the rule of delay in future cases. Consequently, at the time of his alleged

default, Petitioner lacked notice that his failure to exercise diligence in raising all of his claims for collateral relief might result in the application of a procedural rule barring review of new claims raised in subsequent petitions. *See Siripongs v. Calderon, supra,* 35 F.3d at 1318 (pre-*Clark* rules regarding filing of successive petitions not consistently enforced); *Morales v. Calderon,* 85 F.3d 1387, 1392-1393 (9th Cir.), *cert. denied,* ___ U.S. ___, 117 S.Ct. 500, 136 L.Ed.2d 391 (1996); *see also Fields v. Calderon,* 125 F.3d at 761 (consistently applied rule in 1994 could not cure a lack of notice in 1981).

Accordingly, Petitioner is not procedurally barred from seeking federal habeas review of Claims 2 and 4.

4. Analysis of Claims 3 and 5

Respondents contend that Claims 3 and 5 are procedurally barred because Petitioner failed to raise the claims on direct appeal or adequately explain and justify such failure when he raised the claims on collateral review.[12] [*Id.* at 22-25.]

Respondents erroneously assert that, pursuant to *Ylst,* this Court must "look through" the California Supreme Court denial of Petitioner's claims to the earlier decision by the California Court of Appeal denying the claims on procedural grounds. [Answer at 24.] As discussed above, the California Supreme Court denied the

---

[12] The Court agrees with Respondents' assertion that Claims 3 and 5 essentially raise the same issue. [*See* Answer at 23.]

1992 habeas petition "on the merits" without reference to any procedural grounds. [*See* Answer, Ex. I at 236.] An express denial on the merits does not constitute an "unexplained" order as contemplated by *Ylst*. *Cf. Hunter v. Aispuro, supra,* 982 F.2d at 347; *Siripongs v. Calderon, supra,* 35 F.3d at 1316 (state petition denied "both for reasons of procedural default and on the merits"). Accordingly, Petitioner is not procedurally barred from seeking federal habeas review of Claims 3 and 5.

B. Claim 1 – *Miranda* Violation

The Supreme Court's decision in *Miranda v. Arizona,* 384 U.S. 436, 469-473, 86 S.Ct. 1602, 16 L.Ed.2d 694, *rhg. denied sub nom.,* 385 U.S. 890, 87 S.Ct. 11, 17 L.Ed.2d 121 (1966), requires that "a suspect subject to custodial interrogation has the right to consult with an attorney and to have counsel present during questioning, and that the police must explain this right to him before questioning begins." *Davis v. United States,* 512 U.S. 452, 457, 114 S.Ct. 2350, 129 L.Ed.2d 362 (1994). This prophylactic rule was established to safeguard the suspect's right against compulsory self-incrimination.[13] *Id.* (citing *Michigan v. Tucker,* 417 U.S. 433, 443-444, 94 S.Ct. 2357, 41 L.Ed.2d 182 (1974)).

In a custodial setting, law enforcement officers are only free to continue questioning a suspect in a criminal

---

[13] The Fifth Amendment provides that "[n]o person . . . shall be compelled in any criminal case to be a witness against himself." U.S. Const., Amdt. 5.

investigation if the suspect makes a knowing and intelligent waiver of his rights, including the right to seek the advice of counsel. *Id.* at 458 (citations omitted). If the suspect requests counsel, the officers must cease questioning the suspect "until a lawyer has been made available or the suspect himself reinitiates the conversation." *Id.* (citing *Edwards v. Arizona,* 451 U.S. 477, 484-485, 101 S.Ct. 1880, 68 L.Ed.2d 378, *rhg. denied,* 452 U.S. 973, 101 S.Ct. 3128, 69 L.Ed.2d 984 (1981). Thus, "a suspect who has invoked the right to counsel cannot be questioned regarding any offense unless an attorney is actually present." *Id.* (citations omitted).

Courts must conduct an objective inquiry to determine whether the suspect actually invoked his right to counsel. *Id.* at 458-459. "Invocation of the *Miranda* right to counsel 'requires, at minimum, some statement that can reasonably be construed to be an expression of a desire for the assistance of an attorney.' " *Id.* at 459 (quoting *McNeil v. Wisconsin,* 501 U.S. 171, 178, 111 S.Ct. 2204, 115 L.Ed.2d 158 (1991)). "But if a suspect makes a reference to an attorney that is ambiguous or equivocal, in that a reasonable officer in light of the circumstances would have understood only that a suspect might be invoking the right to counsel, our precedents do not require cessation of questioning." *Id.* Consequently, officers may continue to question a suspect who is indecisive about whether to request an attorney.[14] *Id.* at 460.

---

[14] The magic word "attorney" " 'has no talismanic qualities,' and '[a] defendant does not invoke his right to counsel any time the words fall from his lips.' " *United States v. Cheely,* 36 F.3d 1439, 1447-1448 (9th Cir. 1994) (quoting *United*

Petitioner contends that he made it clear that he wanted an attorney and that the officers ignored his request and kept talking to him until they overcame his resistance. [Petition ¶ 10a.]

After advising Petitioner of his rights in accordance with *Miranda*, the officers continued to question Petitioner to see if he understood his rights and would agree to talk to them:

> [Officer Edstrom]: You don't have to go into it blind either, Dale. You can ask us what we mean when we read these things to you too. Any part of it you don't understand, we would be more than happy to explain it to you, we want you to understand before, before we proceed.
>
> [Petitioner]: I don't know what to ask.
>
> [Officer Cullen]: What are your fears, what are you thinking.
>
> [Petitioner]: I just thinkin', maybe I shouldn't say anything without a lawyer and then I think ahh.
>
> [Officer Cullen]: you know what even if you, if you waive your rights, which means if you decide to talk to us, you can stop talking at any time? You can refuse to answer, or you can not talk at all.
>
> [Officer Edstrom]: you can, you can re-in, you can reinvoke your rights once you waive them, if that's what you're worried about. If, if

---

States v. Jardina, 747 F.2d 945, 949 (5th Cir. 1984), *cert. denied*, 470 U.S. 1058, 105 S.Ct. 1773, 84 L.Ed.2d 833 (1985)).

we have questions what you don't want to answer, you say I don't want to answer that question or I don't want to, I just don't want to continue, or, you know. It's totally on your side.

[Petitioner]: Yea.

. . . .

[Officer Cullen]: You understand what you're being charged with?

[Petitioner]: Can I ask question about that or does that have to come later or

[Officer Cullen]: No, no you, you can ask me any questions you want. I may not answer them but I'm more, you know, I want to, we want to cooperate with you as much as we can and of course we

[Petitioner]: Yea, and I want to cooperate with you

[Officer Cullen]: want you to cooperate with us.

[Petitioner]: Yea, I do. . . .

[*See* Answer, Ex. A at 33-35; CT 100-101.] At trial, Petitioner sought to exclude his taped confession on the basis that the officers continued to question him after he asserted his right to counsel. The trial court found that Petitioner's request was not unequivocal and ruled that the tape recorded confession could be used as evidence against him at trial. [RT 93, 95-96.] Similarly, on direct appeal, the state court of appeal held that Petitioner's

"reference to a lawyer was patently ambiguous."[15] [*See* Answer, Ex. A at 41.]

On habeas review, a state court's findings of fact are entitled to a presumption of correctness. *See former* 28 U.S.C. § 2254(d); *Wainwright v. Witt*, 469 U.S. 412, 426, 105 S.Ct. 844, 83 L.Ed.2d 841 (1985); *Sumner v. Mata*, 449 U.S. 539, 546-547, 101 S.Ct. 764, 66 L.Ed.2d 722 (1981) (the presumption of correctness applies equally to the factual determinations made by state trial courts and those made by state appellate courts).

Viewed independently, the evidence in the record before this Court supports the state courts' findings that, under the totality of the circumstances surrounding Petitioner's interrogation, his single reference to a lawyer was ambiguous and equivocal.[16] *See United States v. Davis*,

---

[15] Petitioner argues that, because there was a dispute over what was said on the tape, this Court should not rely on the state court findings. [Attachment to Petition at 8.] Petitioner fails, however, to point to any specific or material error in the transcript relied upon by the state courts. As the state court of appeal noted, the trial court "listened to the tape, read the transcript and considered argument of counsel before resolving the conflicts as to what was said." [Answer, Ex. A at 37.] Thus, the trial court was in the best position to determine what Petitioner said during the interrogation, and Petitioner fails to offer any evidence to contradict those findings.

[16] Neither does the record support Petitioner's contention that he was psychologically "coerced" into waiving his rights simply because the officers kept questioning him and asked if he wanted to know about the children. "The voluntariness inquiry has never been one of but-for causation whereby a confession is rendered inadmissible simply because it was precipitated by police conduct." *See Derrick v. Peterson*, 924 F.2d

512 U.S. at 462 (A suspect's remark that "[m]aybe I should talk to a lawyer" does not equate to a request for counsel). Accordingly, Claim 1 of the pending Petition should be denied.

C. Claim 2 – Failure to Advise Petitioner Pursuant to *Boykin/Tahl*

Under *Boykin v. Alabama*, 395 U.S. 238, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969), due process requires that the record of a guilty plea show that the defendant knowingly and voluntarily waived the privilege against compulsory self-incrimination, the right to a jury trial and the right to confront his accuser. *Boykin v. Alabama*, 395 U.S. at 243. It must also show that the defendant understood the nature and elements of the charges against him and the possible range of sentences. *Id.* at 244 n.7. *People v. Tahl*, 1 Cal.3d 122, 81 Cal.Rptr. 577 (1969), *cert. denied*, 398 U.S. 911, 90 S.Ct. 1708, 26 L.Ed.2d 72 (1970), additionally required that a defendant be given explicit admonition of the rights discussed in *Boykin* before pleading guilty. Federal due process, however, does not require a state court to enumerate all the rights a defendant is waiving when pleading guilty as long as the record indicates that the plea was entered voluntarily and understandingly. *Rodriguez v. Ricketts*, 798 F.2d 1250, 1254 (9th Cir. 1986), *cert. denied*, 479 U.S. 1057, 107 S.Ct. 937, 93 L.Ed.2d 987 (1987).

813, 819 (9th Cir. 1991) (showing photographs of suspect's deceased parents did not amount to psychological coercion).

Petitioner contends that his agreement to submit part of his case on the preliminary hearing transcript amounted to a "slow plea of guilty" and required that he be advised of the privilege against self-incrimination and of the maximum possible sentence in accordance with *Boykin* and *Tahl*. [Petition ¶ 10b.] Respondents contend that Petitioner's agreement did not constitute a slow plea of guilty and, therefore, that he was not entitled to an advisement of his rights. [Supplemental Answer at 4.]

Petitioner's waiver of the right to confront his accuser was not tantamount to a slow plea of guilty. "A plea of guilty is more than a confession which admits that the accused did various acts; it is itself a conviction; nothing remains but to give judgment and determine punishment." *Boykin v. Alabama*, 395 U.S. at 2242. Petitioner's agreement to rely on his stepdaughter's preliminary hearing testimony did not make his guilt a foregone conclusion. As the record amply reflects, the trial court carefully weighed the evidence presented on each count and heard substantial argument by defense counsel before deciding if the prosecution had met its burden to prove each element of each count beyond a reasonable doubt.[17] [RT 226-257, 284-299, 303-318.] This is particularly evident where the court found the prosecution

---

[17] The vigorous argument by defense counsel as to the significance of the evidence presented on the various counts directly conflicts with Petitioner's assertion that this Court should find that a slow plea of guilty was entered because "no . . . meaningful argument [was] presented to avert the clear course to a finding of guilt." [Supplemental Traverse at 4.]

failed to meet its burden in the eight counts where Petitioner was found not guilty. [RT 226, 244, 250, 253, 256-257, 295, 303, 305-306, 317.]

Thus, the trial court was not required to obtain Petitioner's knowing and voluntary waiver of his privilege against self-incrimination, nor was it required to ensure that he understood the maximum possible sentence he was facing.[18] *See Adams v. Peterson*, 968 F.2d 835, 839-840 (9th Cir. 1992), *cert. denied*, 507 U.S. 1019, 113 S.Ct. 1818, 123 L.Ed.2d 448 (1993) (stipulation to facts from which judge or jury may infer guilt not the same as stipulation to guilt or guilty plea). Accordingly, Claim 2 of the pending Petition should be denied.

D. Claims 3 & 5 – Imposition of Consecutive Sentences

Generally, matters relating to state sentencing are not cognizable on federal habeas review. *Miller v. Vasquez*, 868 F.2d 1116, 1118-1119 (9th Cir. 1989). "[I]t is not the province of a federal habeas court to reexamine state-court determinations on state-law questions. In conducting habeas review, a federal court is limited to deciding

---

[18] Petitioner knowingly and voluntarily waived his right to a jury when he agreed to a bench trial. [RT 67-70.] Petitioner also knowingly and voluntarily waived his right to confront his accuser, and, in addition, the prosecutor specifically advised Petitioner that, "based upon the preliminary examination transcript, it is highly likely – in fact I would say it's almost certain that you are going to be convicted upon that testimony." [RT 68-73.] The record further shows that Petitioner was aware at his first bail hearing that he faced a possible sentence far in excess of the one he received. [RT 620.]

whether a conviction violated the Constitution, laws or treaties of the United States." *Estelle v. McGuire*, 502 U.S. 62, 67-68, 112 S.Ct. 475, 116 L.Ed.2d 385 (1991) (citations omitted). However, a due process violation may arise if state sentencing law was misapplied. *See Ballard v. Estelle*, 937 F.2d 453, 456 (9th Cir. 1991); *Whalen v. United States*, 445 U.S. 684, 689 n.4, 100 S.Ct. 1432, 63 L.Ed.2d 715 (1980) (due process presumably prohibits state courts from depriving a person of liberty except to extent authorized by state law).

In Claims 3 and 5, Petitioner contends that the imposition of consecutive sentences pursuant to Cal. Pen. Code § 667 resulted in an illegal and excessive sentence. [Petition ¶¶ 10c, 10e.] Petitioner specifically contends that at least 84 years of his 129-year sentence is excessive because there is no evidence that he threatened the victim with "great bodily harm" to support the imposition of consecutive sentences under Cal. Pen. Code § 667.6. [*Id.* & Attachment to Petition at 1-4.]

Petitioner's contention that his sentence must be reversed is based primarily upon two state appellate court decisions issued a couple of years after his conviction in *People v. Riffey*, 171 Cal.App.3d 419, 217 Cal.Rptr. 319 (1985) and *People v. Foley*, 170 Cal.App.3d 1039, 216 Cal.Rptr. 865 (1985), *rev. denied*, wherein the imposition of full-term consecutive sentences for sodomy and forcible oral copulation were overturned based on a discrepancy between the language of § 667.6(c) and the sodomy and oral copulation statutes.

Petitioner was found guilty on eight counts of lewd act with a child in violation of Cal.Pen. Code § 288(b),

eight counts of oral copulation in violation of Cal. Pen. Code § 288a(c), on four counts of sodomy in violation of Cal.Pen. Code § 286(c), and on five counts of penetration with a foreign object in violation of Cal.Pen. Code § 289. [CT 166.] He asserts that because §§ 286(c), 288a(c) and 289 required proof that the crimes were committed by means of force, violence, duress, menace, or fear of immediate and unlawful bodily injury that the imposition of consecutive sentences pursuant to § 667.6 was improper absent evidence that he threatened the victim with great bodily harm. [Attachment to Petition at 1.]

The record reflects that Petitioner's sentence was imposed pursuant to subdivision (d) of § 667.6 and not subdivision (c). [RT 594, 604-605, 608.] At the time of Petitioner's conviction, § 667.6(d) provided, in pertinent part, as follows:

> A full, separate, and consecutive term shall be served for each violation of subdivision (2) or (3) of Section 261, Section 264.1, subdivision (b) of Section 288, Section 289, or of committing sodomy or oral copulation in violation of Section 286 or 288a by force, violence, duress, menace, or threat of great bodily harm if such crimes involve separate victims or involve the same victim on separate occasions.

Cal.Pen. Code § 667.6(d). Between 1980 and 1985, "there was a dichotomy between the language of Penal Code sections 286, covering sodomy, and 288a, covering oral copulation, and subdivision (d) of section 667.6. Subdivision (c) of both sections 286 and 288a use[d] the language 'fear of immediate and unlawful bodily injury on the victim or another person, while subdivision (d) of section

667.6 still retained the language 'threat of great bodily injury.' " *People v. Moore*, 211 Cal.App.3d 1400, 1417, 260 Cal.Rptr. 134, 146 (1989), *rev. denied*. Thus, "a verdict finding a defendant guilty of a violation of subdivision (c) of sections 286 and 288a did not necessarily imply the findings necessary to invoke the sentencing provisions of section 667.6, subdivision (d), for fear of immediate and unlawful bodily injury 'is a lesser level of coercion than threat of great bodily harm.' "[19] *Id.* (citations omitted). California courts found that errors occurred where it could not be determined from the jury's verdict whether a threat of great bodily harm had occurred. *See id.* at 1418 ("[E]rror, though appearing to be one of sentencing, 'is really in jury instruction . . . failing to require a clear finding of either force or threat of great bodily harm.' ").

At the time of sentencing, the trial court, who also acted as the factfinder in determining Petitioner's guilt, specifically stated that every count Petitioner was convicted of came within § 667.6(d) because the acts were committed with force and violence. [RT 594, 605.] In particular, the court stated: "this applies to all counts that the Court is going to impose sentence on – the crimes involved violence and a threat of harm which discloses a high degree of cruelty and callousness on the part of the defendant."[20] [RT 605.]

---

[19] Both *Riffey* and *Foley* discuss similar problems existing between the language of subdivision (c) of § 667.6 and the oral copulation and sodomy statutes.

[20] The court further found that Petitioner inflicted actual injury or pain by burning the victim with a cigarette on one occasion, by placing a whiffle ball in her mouth on another occasion and when he used foreign objects to sodomize her. [RT 605.]

Petitioner failed to show that the trial court misapplied state sentencing law in violation of his due process rights insofar as the finding that he used force and violence to commit the acts was sufficient to warrant imposing consecutive sentences under § 667.6(d) without an additional finding that he threatened her with great bodily harm. *See People v. Reyes*, 153 Cal.App.3d 803, 812, 200 Cal.Rptr. 651, 656 (1984) (distinguishing verdict based upon force from one based upon fear of immediate and unlawful bodily harm). Accordingly, Claims 3 and 5 of the pending Petition should be denied.

E. Claim 4 – Ineffective Assistance of Counsel

The "benchmark" of any claim that the Sixth Amendment right to counsel has been violated is "whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." *Strickland v. Washington*, 466 U.S. 668, 688, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). In order to prevail on this claim, Petitioner must show "(1) specific acts or omissions of counsel that fall below a standard of professional reasonableness and (2) that these acts 'prejudiced, [him] because there is a reasonable probability that absent the errors the factfinder would have had a reasonable doubt respecting guilt.' " *Smith v. Ylst*, 826 F.2d 872, 875 (9th Cir. 1987), *cert. denied*, 488 U.S. 829, 109 S.Ct. 83, 102 L.Ed.2d 59 (1988) (quoting *Strickland v. Washington*, 466 U.S. at 694). Under the second component, Petitioner must demonstrate counsel's

errors rendered the result unreliable or the trial fundamentally unfair, *Lockhart v. Fretwell*, 506 U.S. 364, 369-370, 113 S.Ct. 838, 122 L.Ed.2d 180 (1993).

The *Strickland* standard is "rigorous" and "highly demanding." *Kimmelman v. Morrison*, 477 U.S. 365, 381-382, 106 S.Ct. 2574, 91 L.Ed.2d 305 (1986). "[T]here is a strong presumption that a lawyer is competent and that presumption must be overcome with concrete evidence." *See Smith v. Ylst*, 826 F.2d at 875. Petitioner must show that "counsel committed 'error so serious that counsel was not functioning as the "counsel" guaranteed by the Sixth Amendment.' " *Morris v. California*, 966 F.2d 448, 454 (9th Cir. 1991), *cert. denied*, 506 U.S. 831, 113 S.Ct. 96, 121 L.Ed.2d 57 (1992) (quoting *Strickland v. Washington*, 466 U.S. at 687).

The standard for assessing the performance of trial and appellate counsel is the same. *Morrison v. Estelle*, 981 F.2d 425, 427 (9th Cir. 1992), *cert. denied*, 508 U.S. 920, 113 S.Ct. 2367, 124 L.Ed.2d 273, *rhg. denied*, 509 U.S. 934, 113 S.Ct. 3068, 125 L.Ed.2d 749 (1993). To prove he was prejudiced by appellate counsel's performance, Petitioner must demonstrate a reasonable probability that, but for counsel's errors, the result of his appeal would have been different. *Id.*

Petitioner contends that both trial and appellate counsel were ineffective for failing to challenge the lengthy sentence he received as a violation of Cal. Pen. Code §§ 667.6. [Petition ¶ 10d.] Respondents argue that counsel had no duty to raise the issue because it lacks merit and because Petitioner failed to show that he was

prejudiced as a result of counsels' performance. [Supplemental Answer at 16-20.]

As discussed above, Petitioner failed to show that a challenge to the legality of his consecutive sentences under Cal.Pen. Code § 667.6(d) would have been successful. Thus, he cannot show that he was prejudiced by counsels' failure to make such a challenge. *See Boag v. Raines*, 769 F.2d 1341, 1344 (9th Cir. 1985), *cert. denied*, 474 U.S. 1085, 106 S.Ct. 860, 88 L.Ed.2d 899 (1986) ("Failure to raise meritless argument does not constitute ineffective assistance."). Accordingly, Claim 4 of the pending Petition should be denied.

V. RECOMMENDATION

In accordance with the foregoing, IT IS RECOMMENDED that the Court issue an order: (1) approving and adopting this Report and Recommendation, and (2) directing that Judgment be entered denying and dismissing the Petition with prejudice.

DATED: February 23, 1998

/s/ Arthur Nakazato
ARTHUR NAKAZATO
UNITED STATES
MAGISTRATE JUDGE

APPENDIX B

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
WESTERN DIVISION

DALE WAYNE BESTELMEYER, Petitioner, v. IVALEE HENRY, Warden, et al., Respondents.	Case No. CV 96-1496-MRP (AN) JUDGMENT (Filed March 25, 1998)

IT IS HEREBY ADJUDGED that this action is denied and dismissed with prejudice for the reasons set forth in the related Magistrate Judge's Report and Recommendation.

DATED: March 23, 1998

/s/ Marianna R. Pfaelzer
MARIANNA R. PFAELZER
UNITED STATES
DISTRICT JUDGE

APPENDIX C

Roger S. Hanson, Esq.
1517 East Fourth Street
Santa Ana, CA 92701
Tel: (714) 953-0638
State Bar 37966
Attorney for DALE BESTELMEYER

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

DALE WAYNE BESTELMEYER, Petitioner, v. IVALEE HENRY, Warden, et al., Defendant.	CASE NO. CV 96-1496-MRP (AN) **NOTICE OF APPEAL**

Notice is hereby given that petitioner Dale Wayne Bestelmeyer appeals to the U.S. Court of Appeals, Ninth Circuit, from the Judgment denying his petition under 28 U.S.C. 2254 executed 3-23-98, and entered 3-27-98.

Dated: April 16, 1998

/s/ Roger S. Hanson
Roger S. Hanson, Esq.
Attorney for Petitioner

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
WESTERN DIVISION

DALE BESTELMEYER, Petitioner, v. IVALEE HENRY, Warden, et al., Respondents.	Case No. CV 96-1496-MRP (AN) ORDER DENYING APPLICATION FOR CERTIFICATE OF PROBABLE CAUSE (Filed May 5, 1998)

On April 22, 1998, Petitioner filed a "Motion/Request for Certificate of Probable Cause."[1]

A certificate of probable cause is granted only if the petitioner makes a substantial showing that he has been denied a federal right. *Barefoot v. Estelle*, 463 U.S. 880, 893, 103 S.Ct. 3383, 77 L.Ed.2d 1090 (1983). "To make this substantial showing, a petitioner must demonstrate that the issues are 'debatable among jurists of reason,' that a

---

[1] The action was filed on March 4, 1996, before the effective date of the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), Pub.L. No. 104-132, 110 Stat. 1214, and, therefore, the AEDPA amendment to 28 U.S.C. § 2253, that now requires a certificate of appealability rather than a certificate of probable cause, is not applicable to the pending application. *Lindh v. Murphy*, 521 U.S. ___, 117 S.Ct. 2059, 2068, 138 L.Ed.2d 481 (1997); *Jeffries v. Wood*, 114 F.3d 1484, 1499 (9th Cir.), *cert. denied*, ___ U.S. ___, 118 S.Ct. 586, 139 L.Ed.2d 423 (1997). Accordingly, it is unnecessary to decide whether the AEDPA amendments changed the standards for appeal.

court could resolve the issues differently, or that the issues are 'adequate to deserve encouragement to proceed further.' " *Clark v. Lewis*, 1 F.3d 814, 819 (9th Cir. 1993), *citing Barefoot v. Estelle*, 463 U.S. at 893 n.4; 28 U.S.C. 2253.

As set forth in the findings of the Report and Recommendation and Final Report and Recommendation herein, adopted as the findings of the Court, Petitioner has failed to present a colorable claim for federal habeas corpus relief. Accordingly, Petitioner has not made a substantial showing that he has been denied a federal right.

Therefore, pursuant to 28 U.S.C. § 2253, the application for a certificate of probable cause is DENIED.

/s/ Marianna R. Pfaelzer
MARIANNA R. PFAELZER
UNITED STATES
DISTRICT JUDGE

Presented on April 27, 1998 by:

/s/ Arthur Nakazato
UNITED STATES MAGISTRATE JUDGE

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

DALE WAYNE BESTELMEYER, Petitioner, vs. IVALEE HENRY; et al., Respondents.	No. 98-55879 DC# CV 96-1496-MRP (AN) Central California ORDER (Filed July 7, 1998)

Before: THOMPSON and LEAVY, Circuit Judges

The request for a certificate of appealability is denied. *See* 28 U.S.C. § 2253(c)(2).